Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-147

DICK RHEINGANS, *Petitioner*,

vs.

JOHN M. MITCHELL, Attorney General of the United States; CURTIS W. TARR, Director of Selective Service of the United States; CARLOS C. OGDEN, as Director of Selective Service of the State of California; and BURTON W. MANN, NEIL J. CALLAHAN, LAWRENCE J. HILL, JAMES K. GILLESPIE, MILLARD J. SOMMER, OCTAVIUS BARBERI, NICHOLAS R. MONTESANO, WILLIAM H. MADERIS, as Members of Selective Service Board No. 62, *Respondents*.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI
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STATEMENT OF CASE

This case originated in the United States District Court, Northern District of California, Southern Division, on the filing of a complaint seeking to force Selective Service Board No. 62 to reopen a 1-O classification of petitioner and hold a hearing to determine

his entitlement to a claimed III-A (dependency-hardship) classification. Many months after being classified I-0, petitioner's parents became physically unable to support themselves, and petitioner's sister and her son also became dependent upon petitioner. On uncontradicted facts the Selective Service Board refused to reopen and give petitioner a hearing on his application for a change in classification.

Jurisdiction of the United States District Court was sought under 28 U.S.C. Sec. 1331 because the action arose under the Constitution of the United States, specifically the First and Fifth Amendments and also under the Universal Military Training and Service Act of 1948 as amended, now entitled The Selective Service Act of 1967 (50 U.S.C. App. Sec. 451 et seq.), and under Sec. 1 of Articles I, II and III of the Constitution, and under 28 U.S.C. Sec. 1331, Sec. 1361, Sec. 2201, Sec. 2282, and Sec. 2284.

Following a hearing, the Honorable Robert F. Peckham, United States District Judge, issued his order dated November 18, 1968, enjoining respondents above-named from ordering petitioner to report for civilian work until Selective Service Board No. 62 had reopened and considered petitioner's request for a reclassification of status. A copy of Judge Peckham's order is attached hereto as Appendix I.

There after, this Court issued its decision in *Clark v. Gabriel,* 393 U.S. 256 (1968), following which the United States Attorney on behalf of respondents moved for a dismissal of the Complaint and for dissolution of the preliminary injunction. Judge Peck-

ham, relying on *Gabriel*, vacated the preliminary injunction and dismissed the action. A copy of said order is attached hereto as Appendix II.

On appeal the United States Court of Appeal for the Ninth Circuit affirmed the dissolution of the injunction and the dismissal of the Complaint, a copy of the decision being attached as Appendix III. A Petition for Rehearing was filed, and on March 5, 1971, a Petition for Rehearing was denied, a copy of said order being attached hereto as Appendix IV. Upon application of petitioner to this Court, an order extending time to file Petition for Writ of Certiorari dated June 2, 1971, issued, extending the time to August 2, 1971, a copy of said order being attached hereto and marked Appendix V.

This Court has jurisdiction over the issues presented under the following statutory provisions (28 U.S.C. 1244(1)):

ISSUES

I. IS CIVIL JUDICIAL REDRESS BARRED BY SECTION 10(b)(3) OF THE MILITARY SELECTIVE SERVICE ACT OF 1967, 50 U.S.C. APP. SECTION 460(b)(3), WHEN A LOCAL SELECTIVE SERVICE BOARD REFUSES TO REOPEN A I-O CLASSIFICATION AND CONSIDER NEW INFORMATION WHICH, IF TRUE, WOULD JUSTIFY A CHANGE IN CLASSIFICATION TO III-A (HARDSHIP TO DEPENDENTS)?

FACTS

On or about November 8, 1965, petitioner was classified I-O (Conscientious Objector) by his draft board. Approximately a year and one-half later his parents became physically unable to support them-

selves, and his sister and her son became dependent upon him. Petitioner was residing with his parents at that time. Petitioner then applied to the local board for a change in classification to III-A, the hardship-dependency classification. Local Board No. 62 declined to reopen the case or reclassify petitioner even though the information in his file at that time, as found by United States District Judge Peckham, ". . . clearly established a prima facie case . . ." for the III-A classification. Judge Peckham further found that, "the plaintiff's Selective Service file includes no basis in fact for the Board's refusal to reopen plaintiff's classification. Furthermore, the file contains no facts or statements to contradict the statements made by plaintiff in support of his request to reopen." (See Appendix I.)

With assistance of an attorney, petitioner finally obtained a "courtesy" appearance before the Board, and at that appearance a Board member stated to petitioner, *"Tell your parents to sell their home and go on welfare."* Following the interview, petitioner was again advised the Board would not reopen his classification nor reclassify him.

Petitioner was ordered to report for civilian work under his I-O classification, and then sought the aid of the Court to force a reopening of his classification by the Local Board so as to have his request for change in classification considered by the Board and to preserve for himself the right of appeal within the administrative system should the Board refuse to reclassify.

ARGUMENT

I

SECTION 10(b)(3) OF THE MILITARY SELECTIVE SERVICE ACT OF 1967,[1] 60 U.S.C. APP. SECTION 460(b)(3) DOES NOT BAR PRE-INDUCTION[2] JUDICIAL REVIEW OF THE LEGALITY OF A LOCAL DRAFT BOARD'S REFUSAL TO REOPEN A SELECTIVE SERVICE REGISTRANT'S CLASSIFICATION.

Petitioner respectfully suggests that the action of Local Board No. 62 in refusing to reopen his classi-

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[1]10(b)(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title, together with such other duties as may be assigned under this tile; *Provided,* That no person shall be disqualified from serving as a counselor to registrants, including service as Government appeal agent, because of his membership in a Reserve component of the Armed Forces. He shall create and establish one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and possession of the United States, and in the District of Columbia. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors or comparable executive officials. No member shall serve on any local board or appeal board for more than twenty-five years, or after he has attained the age of seventy-five. No citizen shall be denied membership on any local board or appeal board on account of sex. The requirements outlined in the preceding two sentences shall be fully implemented and effective not later than January 1, 1968; *Provided,* That an intercounty local board consisting of at least one member from each component county or corresponding subdivision may be established for an area not exceeding five counties or political subdivisions corresponding thereto within a State or comparable jurisdiction when the President determines, after considering the public interest involved and the recommendation of the governor or comparable executive official or officials, that the establishment of such local board area will result in a more efficient and economical operation. Any such intercounty local board shall have within its area the same power and jurisdiction as a local board has in its area. No member of any local board shall be a member of the armed forces of the United States, but each member

fication and consider the request for a change was illegal. The requirements for a III-A classification

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of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction, and each intercounty local board shall have at least one member from each county or political subdivision corresponding thereto included within the intercounty local board area. Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. There shall be not less than one appeal board located within the area of each Federal judicial district in the United States and within each territory and possession of the United States, and such additional separate panels thereof, as may be prescribed by the President. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States and who are not members of the armed forces. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title, and the determination of the President shall be final. No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant. No person who is a civilian officer, member, agent, or employee of the Office of Selective Service Records, or the Selective Service System, or of any local board or appeal board or other agency of such Office or System, shall be excepted from registration or deferred or exempted from training and service, as provided for in this title,

are set forth at 32 C.F.R. Sec. 1622.30(b), which, in the relevant portion, provides:

> "In Class III-A *shall* be placed any registrant whose induction into the armed services would result in an extreme hardship (1) to his . . . parent . . . [or] sister who is dependent upon him for support . . ."

The information presented to the Local Board, as recited by the District Court below, is that,

> "The plaintiff here, in his first request for a reopening of his classification on May 28, 1967, stated that since his I-O classification on November 8, 1965, his father who had planned on receiving a pension from a carpenter's union could not get the pension due to an insufficient number of hours worked and that his father's health problems foreclosed any possibility of working. Selective Service File P. 76. His statement also indicated that his parents received only Social Security payments and hence would be unable to live without his support, which he stated amounted to $100.00 per month for rent, $150.00 for expenses, and payment of his parents $500.00 annual property tax. The evidence offered—which included a statement of his father and letters from his parents' doctors—also indicated that the income provided by the registrant could not readily be replaced. Since his mother could also not work due to health problems, since his

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by reason of his status as such civilian officer, member, agent, or employee;

[2]Although in this case the proper phrase would be "pre-civilian work" since petitioner is a conscientious objector who was classified I-O, we will use the more familiar "pre-induction" terminology for simplicity.

unmarried sister was not working, since his married brother and 3 married sisters could not help monetarily because they were supporting their own families, and since the parents' income was limited to Social Security payments, it appeared the parents would incure an extreme hardship if deprived of the Plaintiff's support.

"Subsequent requests by the Plaintiff to re-open his classification disclosed additional facts indicating his contributions and the hardship upon his parents if deprived of such contributions. In a letter on August 2, 1967, the Plaintiff repeated the facts of his parents' incapacity to work and stated that the only payments to his parents aside from his contributions were his father's $90.00 monthly Social Security payments. Selective Service File, pp. 84-85. He further stated that without his support, his parents would be forced to sell their house.

"In a further request to re-open on September 30, 1967, the Plaintiff presented an Affidavit from his parents stating their dependency upon him and additional letters from their doctors indicating their respective incapacity to work. In their affidavit, the parents listed their minimum yearly expenses as $4,185.56. The Social Security payments contributed $1,080.00 toward these expenses, while the parents stated the Plaintiffs 'minimum contribution' was $3,105.56.

"The plaintiff's final request to re-open his classification was made in a letter on November 10, 1967. There, he repeated his prior statements that since his I-O classification in 1965, his parents—plus a sister and her son—had 'become totally dependent upon me for their support.'"

(Order Granting Preliminary Injunction, pp. 5, 6, Record, pp. 68, 69.)

The Selective Service System Regulations applicable to the present case are found in Part 1625 of the Selective Service Regulations, 32 C.F.R. Section 1625. Section 1625.1 provides that "No classification is permanent". Section 1625.2 states that:

> "The Local Board may re-open and consider anew the classification of a registrant (a) upon the written request of the registrant, . . . any person who claims to be a dependent of the registrant, . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not consider when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be re-opened after the Local Board has mailed to such registrant . . . an order to report for civilian work and statement of employer (SSS Form 153) unless the Local Board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant has no control."

Section 1625.4 provides:

> "When a registrant, any person who claims to be a dependent of the registrant . . . files with the Local Board a written request to re-open and consider anew the registrant's classification

> and the Local Board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified, or, even if new facts are presented, the Local Board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not re-open the registrant's classification."

If the Local Board re-opens a registrant's classification, then Sections 1625.11-1625.14 in essence give the registrant the same rights that he had upon initial classification; namely, that he have a personal interview before the Board and that he have all the applicable administrative appeal rights as set forth in Sections 1626 and 1627 of the Selective Service Regulations.

Case law in the 9th Circuit and other circuits has long recognized the principle that where a registrant presents a prima facie case for reclassification, the Local Selective Service Board is required to reopen the registrant's classification and pass upon the merits of the registrant's claim, thus according to the registrant his right to a personal appearance before the Board and his right to an administrative appeal of the Local Board's decision. *Stain v. United States,* 235 F.2d 339 (9th Cir. 1956); *Miller v. United States,* 388 F.2d 973 (9th Cir. 1967); *United States v. Garcia,* Crim. 1265-CD-(1 H), 1 SSLD 3016 (C.D. Cal. January 22, 1968); *United States v. Abajian,* No. 1576—Crim. (C.O. Cal. March 18, 1968); *Olvera v. United States,* 223 F.2d 880 (5th Cir. 1955);

United States v. Vincelli, 215 F.2d 210 (2d Cir. 1954); *United States v. Freeman,* 388 F.2d 246 (7th Cir. 1967); *Townsend v. Zimmerman,* 237 F.2d 376 (6th Cir. 1956); *United States v. Burlich,* 257 F. Supp. 906 (S.D.N.Y. 1966).

Applying this standard, the District Court found that Petitioner had not only "... clearly established a prima facie case, requiring the Selective Service Board to reopen the Plaintiff's case to determine whether his new status required reclassification," but further found that,

> "The plaintiff's (petitioner here) Selective Service File includes no basis in fact for the Board's refusal to reopen plaintiff's (petitioner) classification. Furthermore, the file contains no facts or statements to contradict the statements made by the plaintiff (petitioner) in support of his request to reopen."

II

PETITIONER RESPECTFULLY SUGGESTS THAT CLARK v. GABRIEL, 393 U.S. 256 (1968) DID NOT DEPRIVE THE COURT OF JURISDICTION.

It is well settled that, but for the possible effect of Section 10(b)(3) of the Military Selective Service Act of 1967, the District Court could exercise proper jurisdiction over the case at hand under 28 U.S.C. Section 1331, Section 1361, Section 2201, Section 2282, and Section 2284. The District Court below relied exclusively on *Gabriel* in vacating its pre-

viously issued preliminary injunction and dismissing the Complaint, and the Ninth Circuit relied primarily on the same decision. Petitioner suggests that his factual situation presents a case much more similar to, and therefore more properly disposed of, under the rationale of *Oestereich v. Selective Service System,* 393 U.S. 233 (1968). In *Oestereich* judicial review was upheld whereas in *Gabriel* it was denied.

In this case, as in *Oestereich,* "we deal with conduct of a Local Board that is basically lawless." *Oestereich* upheld the availability of pre-induction judicial review to a Selective Service registrant whose statutory exemption from military service as a divinity student had been rescinded, and who was classified I-A and finally ordered for priority induction as a "Delinquent" for returning his registration certificate to the government as an expression of his dissent from American participation in the war in Vietnam. In holding that Section 10(b)(3) of the Military Selective Service Act of 1967 did not preclude such judicial review, Mr. Justice Douglas noted for the Court that, "No one, I believe, suggests that Section 10(b)(3) can sustain a literal reading." While he did not specifically spell out the underlying policy of Section 10(b)(3), he noted that the issue presented was essentially legal and not a factual one. "In such instances, as in the present one, there is no exercise of discretion by a board in evaluating evidence and in determining their acclaimed exemption if deserved." In a footnote he added, "We would have a somewhat different problem with the contest

over, say, the quantum of evidence necessary to sustain a Board's classification." He concluded, however, that

> "To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the act with unnecessary harshness."

Mr. Justice Harlan in his concurrence dealt at some length, however, with the rationale which was left implicit in the opinion of the Court.

> "Classification is a highly individualized process, in which a board *must* consider all pertinent information presented to it. . . . Thus, a board may be required to determine, on a conflicting record, whether a registrant is conscientiously opposed to participation in war in any form, 32 CFR Section 1622.14, or whether the registrant's deferment 'is in the national interest and of paramount importance to our national society . . .' 32 C.F.R. Section 1622.20. A Board also exercises considerable discretion in the processing of registrants—for example, in securing information relevant to classification, 32 CFR Sections 1621.9-1621.15, scheduling of physical examinations, 32 CFR, Part 1628, and scheduling and postponement of induction itself, 32 CFR, Part 1632.
>
> "Congress's decision to defer a judicial review of such decisions by the Selective Service Boards until after induction was, I believe, responsive to two major considerations. *First,* because these

determinations are of an individualized and discretionary nature, a reviewing Court must often examine Board records and other documentary evidence, hear testimony, and resolve controversies on a sizeable record. Even though the scope of judicial review is narrow, see *Estep v. United States, Supra,* at 122-123, this cannot be done quickly. To stay induction pending such review would work havoc with the orderly processing of registrants into the Nation's Armed Forces. See 113 Cong. Rec. 8052 (June 12, 1967) (Senator Russell); cf *Estep v. United States, Supra,* at 137 (concurring opinion of Mr. Justice Frankfurter).

"*Second,* the registrant has been afforded prior to his induction the opportunity for a hearing and administrative appeal within the Selective Service System, 32 CFR, Part 1624-1627. It is properly presumed that a registrant's board has fully considered all relevant information presented to it, and that it has classified and processed him regularly, and in accordance with the applicable statutes and regulations. [Citations]"

Gabriel, decided on the same day as *Oestereich,* denied judicial review in the case of a registrant who wished to make a preinduction challenge of his Board's refusal to grant him the conscientious objector status which he had requested, this coming *after* "his appeals within the Selective Service System were unsuccessful".

Gabriel was granted a personal appearance, at which he testified before the Local Board. The Board weighed his testimony before them, the information

submitted in his special form for conscientious objectors (SSS Form 150), and a lengthy report from a Department of Justice investigating officer. It was this mass of evidence, much of it contradictory in its implications, which *Gabriel* was asking the District Court to review. A judicial finding that the Board did or did not have any "basis in fact" for the I-A classification would require a review of the registrant's entire Selective Service File in addition to other information, such as his testimony and that of the Board members as to the specific information conveyed at his personal appearance. It was this prospect which the Court was reacting to when it said:

> "To allow pre-induction judicial review of such determinations would be to permit precisely the kind of 'litigious interruptions of procedures to provide necessary military manpower' (113 Cong. Rec. 8052) (June 12, 1967) (Report by Senator Russell on Conference Committee Action) which Congress sought to prevent when it enacted Section 10(b)(3)." *(Gabriel)*

In the case at hand, the Board has not yet exercised its discretion. It is precisely that refusal to act and exercise its discretion which is being challenged here. We respectfully suggest that *Gabriel* would be analogous only if the Board had refused to grant the applicant a personal appearance or to forward his file to the State Appeal Board after he had filed timely notice for either such actions. Refusal by a Board to act on timely notice would be a flagrant vio-

lation of the Selective Service System's own administrative regulations.

We are not here concerned with the question of whether petitioner was entitled to a II-A classification. The District Court specifically noted that ". . . upon reopening the Selective Service Board may have justification to deny plaintiff re-classification upon the merits. . . ." The question before the Court was simply whether the Board's refusal to reopen the classification was lawful or unlawful. This is purely a question of law and, as the Court noted in *Oestereich,* one where ". . . there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved."

Finally, the primary congressional policy underlying the adoption of Section 10(b)(3) is clearly a desire to avoid litigious interruption of the procurement of military manpower. This interest can best be served by retaining jurisdiction in this type of case rather than by abandoning it. As Mr. Justice Harlan noted in his *Oestereich* concurrence, one of the assumptions underlying the congressional denial of pre-induction judicial review is that ". . . the registrant has been afforded, prior to his induction, the opportunity for a hearing and administrative appeals within the Selective Service System . . .". It was precisely this appellate machinery of review which was denied petitioner. Indeed, this is a case where the registrant has not been *allowed* to exhaust his administrative remedies.

If a final order of the Court were to direct Local Board No. 62 to reopen petitioner's case, the Local Board would then have an opportunity to formally consider his claim for a III-A deferment, which it might well grant at that time. Even if he was at first rebuffed, he might be able to persuade them or point out factors which they might have overlooked at a personal appearance. Even if that proved unsuccessful, the Local Board's decision might well be corrected by the State Appeal Board or by the Presidential Appeal Board if the Appeal Board's decision was not unanimous. If the Federal Courts do not intervene at this stage of the proceedings, petitioner, and all other registrants similarly situated will be left with only the alternatives of passively submitting to the illegal actions of the Local Board, accepting orders to report for induction or civilian work and raising their claims on a petition for habeas corpus, or refusing to submit to such an order and raising their claims as a defense to criminal prosecutions. In the first instance justice would be the clearer loser. In the latter two instances, both the Selective Service System and the Courts will find themselves burdened with extensive litigation *which might have been wholly unnecessary* if the Local Board had been ordered to follow the dictates of the law in the first place.

The government argued in its brief before the Ninth Circuit that the discretionary nature of the III-A deferment removed any right to preinduction review. Petitioner suggests that such a position can-

not be squared with the rationale of Section 10(b)(3) of the Military Selective Service Act of 1967 as interpreted in *Clark v. Gabriel*, 393 U.S. 256 (1968), and *Oestereich v. Selective Service Board*, 393 U.S. 233 (1968), namely, the avoidance of "litigious interruption of procedures to provide necessary military manpower." This rationale lies at the heart of the distinction between the two cases. Full blown "basis-in-fact" challenges to clearly discretionary board actions, such as the denial of *Gabriel's* conscientious objector claim, will require extensive judicial examination. Review of the simple non-discretionary actions of a board where they override a registrant's clear legal rights, such as the rescission of *Oestereich's* ministerial deferment or the refusal to reopen petitioner's classification, involve a much more limited and manageable inquiry. Indeed, as we have argued, judicial intervention at this stage requiring local boards to abide by their own regulations will *allow* a registrant to exhaust his administrative remedies and, in the long run, by eliminating many prosecutions for refusal to submit to induction and in-service habeas corpus petitions, actually reduce the litigious interruption of the conscription process.

It must be noted that a Selective Service registrant is required to punctiliously obey the most technical requirements of the Military Selective Service Act and the Selective Service Regulations, all under the most severe penalties for failure to comply. If he fails to notify his Board of a change in address he may be declared a "delinquent" and ordered for

immediate induction. If he does not request a personal appearance or an appeal, or if he does not return his special form for conscientious objectors precisely within the prescribed time period, his rights are deemed waived. Is less to be demanded of the Board members themselves? Are their violations of the law to go unchallenged until they are finally perpetrated against a registrant with temerity, and the financial and emotional resources, to raise a post-induction complaint through habeas corpus proceedings or in defense against a criminal indictment? Petitioner respectfully suggests that in the case such as his, the Local Board should be required to reopen the classification and deal with the merits of the claim, thus affording a registrant his right to appeal within the administrative system. We believe that this will probably afford more justice while at the same time reducing demands on our already overloaded judicial branch of the government.

CONCLUSION

Petitioner respectfully requests that this Court issue its Writ of Certiorari, and following a hearing on the merits remand the case to the District Court, Northern District of California, Southern Division, with instructions to reinstate the Complaint and the preliminary injunction previously issued, and for such further proceedings as are deemed necessary.

Dated, San Jose, California,

July 22, 1971.

Respectfully submitted,
THORNE, CLOPTON, HERZ, STANEK, INC.,
By JOHN E. THORNE,
Attorneys for Petitioner.

(Appendices Follow)

Appendix I

In the United States District Court
Northern District of California

Dick Rheingans, Plaintiff, vs. Ramsey Clark, et al., Defendants.	No. 50,181

ORDER

Plaintiff filed this action for a preliminary injunction enjoining the defendants from ordering him to report for civilian work as a conscientious objector. He contends his local Selective Service Board erred in refusing to reopen and consider his classification and alleges that he is entitled to deferment for hardship to or dependency of his parents in a III-A classification rather than his current I-O.

The defendants contend this court lacks jurisdiction over this matter and further claim the local board acted properly in refusing to reopen the plaintiff's classification. For the reasons stated below, this court finds neither contention of the defendants persuasive and hence orders the preliminary injunction be issued.

Initially, the defendants argue that 50 U.S.C. App. § 460(b)(3) bars any civil action to enjoin the ordering of a selective service registrant for civilian work.

Though many cases have held that 50 U.S.C. App. § 460(b)(3) precludes any judicial review by way of civil actions (see defendants' memorandum of points and authorities), this court finds the reasoning of Judge Alfonso J. Zirpoli in *Petersen v. Clark,* 285 F. Supp. 700 (N.D. Cal. 1968) persuasive. In *Petersen,* Judge Zirpoli ruled that the restriction on review of § 460(b)(3) was a denial of due process under the Fifth Amendment and, therefore, unconstitutional. Chief Judge George B. Harris followed the *Petersen* rationale in *Gabriel v. Clark,* 287 F. Supp. 369 (N.D. Cal. 1968), appeal filed 37 L.W. 3104 (1968).

In adopting the *Petersen* approach, this court need not recite the reasoning and precedent analyzed with thoroughness by Judge Zirpoli. The facts of the *Petersen* case are substantially similar to those in the instant case to warrant the application of the *Petersen* rationale. The plaintiff in *Petersen* sought pre-criminal and pre-compliance judicial review of his local board's order for induction. Among his contentions, he alleged the local board had arbitrarily refused to reopen his classification.

The plaintiffs in both *Petersen* and the present matter faced a precarious dilemma under the existing Congressional scheme stated in § 460 (b)(3). Only two alternative existed to challenge via judicial review the validity of a Selective Service Board's actions concerning classification and attendant procedures. The registrant could either comply with the allegedly invalid order, subsequently seeking judicial

review through a writ of habeas corpus. Or, alternatively, he could risk imprisonment by ignoring the induction order and raising the issue of its validity as a defense to a criminal prosecution.

Though some governmental interests may support the continuance of this hobson's choice (see *Petersen v. Clark,* 285 F. Supp. 700, 711-12 (N.D. Cal. 1968)), accepted notions of due process cannot be harmonized with conditioning judicial review on complying with an invalid order or risking a criminal penalty. When weighed against the potential and substantial restraints upon an individual's liberty, these governmental interests do not justify the limited avenues of judicial review open to the registrant by § 460 (b)(3). Accordingly, this court agrees with the holding in *Petersen* that § 460 (b)(3) is unconstitutional in denying due process to registrants wishing to challenge the validity of induction or work orders.

The defendants next contend this court lacks jurisdiction under 28 U.S.C. § 1331, since the matter in controversy does not exceed the sum or value of $10,000. Yet, in determining whether a substantial claim exists for an amount which satisfies the statute, this court will look not only to the pleadings but to any submitted affidavits or evidence in the court record. In his declaration submitted November 8, 1968, the plaintiff states he currently earns "between $800.00 and $900.00 per month as salary, which monies are used to support both my parents and myself." He further alleges on information and belief that his salary in the civilian work ordered by

the Selective Service System would be approximately $315.00 per month. (This figure exceeds the salary approximation stated by the Chief of the Registration and Conscientious Objector Section, California Headquarters, Selective Service System (p. 69 of plaintiff's selective service file)). These salary figures are in accord with the plaintiff's testimony before this court on November 8, 1968.

Therefore, during the 24-month period of civilian work as a conscientious objector, the plaintiff would earn approximately $7,560. If he continued in his current employment, he would earn approximately between $19,200-$21,600 during the 24 months. Since the difference between these two salaries exceeds $10,000, the plaintiff has satisfied the monetary jurisdictional requirements of 28 U.S.C. § 1331.

The defendants next contend that the plaintiff failed to present a prima facie case for re-opening and re-classification as a III-A. Thus, the defendants allege, the local Selective Service Board properly exercised its discretion in refusing to reopen the plaintiff's classification.

The relevant regulation, 32 C.F.R. § 1625.2, provides that a "local board may reopen and consider anew the classification of a registrant . . . [if presented with] facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification. . . ." In interpreting this regulation, the courts, including the Ninth Circuit, have framed the following approach: when a prima facie case for reclassification is presented, the

local board is required to re-open the record to determine whether the registrant is entitled to the change requested. *Miller v. United States,* 388 F.2d 973 (9th Cir. 1967); *Stain v. United States,* 235 F.2d 339 (9th Cir. 1956).

Thus, the issue before this court is whether the defendant presented to the Selective Service Board a prima facie case for a III-A dependency or hardship classification; the merits of the claim for a change in classification are not here involved. A prima facie case arises when offered facts, if true and uncontradicted, would be sufficient under the regulations to warrant granting the requested classification. *Miller v. United States,* 388 F.2d 973, 975 (9th Cir. 1967). When such facts are not frivolous and present a prima facie case, then the board's refusal to reopen the case constitutes a denial of procedural due process. *Stain v. United States,* 235 F.2d 339, 343 (9th Cir. 1956). Since a reopening gives the registrant rights to a personal interview and administrative appeals under 32 C.F.R. §§ 1625.11-1625.14, refusing to reopen forecloses the registrant from exercising these rights.

In the instant matter, plaintiff contends he has presented a prima facie case to his local board for reclassification as a III-A. The requirements for a III-A classification are set forth in 32 C.F.R. § 1622.30 (b), which provides:

> In Class III-A shall be placed any registrant whose induction into the armed services would result in extreme hardship (1) to his . . . parent . . . . [or] sister who is dependent upon him for support. . . .

To establish a prima facie case under this regulation, the registrant must present evidence not only of substantial financial contributions made by him to a dependent listed in the regulation, but also of the extreme hardship that dependent would suffer if deprived of the support. The plaintiff here, in his first request for a reopening of his classification on May 28, 1967, stated that since his I-O classification on November 8, 1965, his father—who had planned on receiving a pension from a carpenter's union—could not get the pension due to an insufficient number of hours worked and that his father's health problems foreclosed any possibility of working. Selective Service File p. 76. His statement also indicated that his parents received only social security payments and hence would be unable to live without his support, which he stated amounted to $100 per month for rent, $150 for expenses, and payment of his parents' $500 annual property tax. The evidence offered—which included a statement of his father and letters from his parents' doctors—also indicated that the income provided by the registrant could not readily be replaced. Since his mother could also not work due to health problems, since his unmarried sister was not working, since his married brother and three married sisters could not help monetarily because they were supporting their own families, and since the parents' income was limited to social security payments, it appeared the parents would incur an extreme hardship if deprived of the plaintiff's support. *Id.* at 76-78.

Subsequent requests by the plaintiff to reopen his classification disclosed additional facts indicating his

contributions and the hardship upon his parents if deprived of such contributions. In a letter on August 2, 1967, the plaintiff repeated the facts of his parents' incapacity to work and stated that the only payments to his parents aside from his contributions were his father's $90 monthly social security payments. Selective Service File, pp. 84-85. He further stated that without his support, his parents would be forced to sell their hours. *Id.* at 85.

In a further request to reopen on September 30, 1967, the plaintiff presented an affidavit from his parents stating their dependency upon him and additional letters from their doctors indicating their respective incapacity to work. *Id.* at 115-118. In their affidavit, the parents listed their minimum yearly expenses as $4,185.56. The social security payments contributed $1,080 toward these expenses, while the parents stated the plaintiff's "minimum contribution" was $3,105.56. *Id.* at 116.

The plaintiff's final request to reopen his classification was made in a letter on November 10, 1967. There, he repeated his prior statements that since his I-O classification in 1965, his parents—plus a sister and her son—had "become totally dependent upon me for their support." *Id.* at 125.

The alleged facts and statements presented in the plaintiff's first request to reopen on May 28, 1967, appear to be of enough substance to establish a prima facie case of change in status. Yet, even if the information in the first request be considered incomplete, the alleged facts and statements presented in the

subsequent three requests to reopen—when taken together with the first request—clearly established a prima facie case, requiring the selective service board to reopen the plaintiff's case to determine whether his new status required reclassification. See *Stain v. United States,* 235 F.2d 339, 342 (9th Cir. 1956). The plaintiff's selective service file includes no basis in fact for the board's refusal to reopen plaintiff's classification. Furthermore, the file contains no facts or statements to contradict the statements made by the plaintiff in support of his request to reopen.

Therefore, though upon reopening the selective service board may have justification to deny plaintiff reclassification upon the merits, the plaintiff's due process rights were denied by the board's refusal to reopen after a prima facie case was presented. Accordingly, this court orders that a preliminary injunction be issued enjoining the defendants from enforcing an order issued on October 10, 1968, to have the plaintiff report for civilian work. The defendants are further enjoined from issuing to the plaintiff any order directing him to report for civilian work until the local selective service board, consistent with this opinion, reopens and considers plaintiff's request for a reclassification of status.

Dated: Nov. 18, 1968.

/s/ Robert F. Peckham
United States District Judge

Original Filed November 18, 1968,
Clerk, U.S. District Court,
San Francisco.

Appendix II

In the United States District Court
Northern District of California

Civil No. 50181

Dick Rheingans, Plaintiff,

vs.

Ramsey Clark, etc., et al., Defendants.

ORDER

On January 30, 1969, this court heard the motion of the defendants to vacate the preliminary injunction and to dismiss the complaint and action. After careful consideration of the oral arguments, pleadings, and other submitted papers, this court now orders—pursuant to the dictates of *Clark v. Gabriel,* 393 U.S. ..... (December 16, 1968)—that:

1) the preliminary injunction issued November 18, 1968, be vacated; and

2) civil action No. 50181, filed in the United States District Court for the Northern District of California, and its complaint be dismissed.

Dated: February 3, 1969.

/s/ Robert F. Peckham
United States District Judge

Filed February 4, 1969,
C. C. Evensen, Clerk.

Appendix III

United States Court of Appeals
for the Ninth Circuit

No. 24,269

Dick Rheingans,
Plaintiff-Appellant,
v.
John N. Mitchell,* etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court
Northern District of California

Before: Chambers, Ely and Carter, Circuit Judges.

Per Curiam:

This case raises the question as to whether a Selective Service registrant classified I-O may bring a civil action prior to compliance with an order to report for civilian work in lieu of induction, to compel his Board to reopen and classify him in class III-A.

*We have substituted John N. Mitchell, present Attorney General, for Ramsey Clark, pursuant to Rule 25(d)(1) Fed. Rules of Civil Procedure.

Appellant sought declaratory and injunctive relief. He had been classified I-O but had applied to his local board for a hardship deferment, [class III-A] by reason of the asserted dependency upon him of his parents and other relatives. The board refused to reopen and reclassify plaintiff, and after appellant was ordered to report for civilian work he brought a civil action to review his claim.

The district court, relying upon district court decisions in *Petersen v. Clark* (N.D. Cal. 1968) 285 F.S. 700 and *Gabriel v. Clark* (N.D. Cal. 1968) 287 F.S. 369, entered a preliminary injunction enjoining the enforcement of the order to report for civilian work. Following the reversal by the Supreme Court of the district court decision in *Gabriel, Clark v. Gabriel* (1968) 393 U.S. 256, the government moved to dismiss pursuant to 50 U.S.C. App. § 460(b)(3). The district court granted the motion and dismissed the action. It refused to continue the injunction pending an appeal.

Clark v. Gabriel (1968) 393 U.S. 256 and *Oestereich v. Selective Service Bd.* (1968) 393 U.S. 233, were decided the same day by the Supreme Court. *Clark* discussed *Oestereich* and pointed out, "In *Oestereich* the delinqency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the Board. . . . Here, [in Clark], by contrast, there is no doubt of the Board's statutory authority to take action which appellee chal-

lenges, and that action inescapably involves a determination of fact and an exercise of judgment." [p. 258].

Breen v. Selective Service Bd. (1970) 396 U.S. 460, relied on *Oestereich* and does not even cite *Clark*. In reversing the Second Circuit, the opinion points out that the Court of Appeals "felt that the reference in § 6(h)(1) to 'such rules and regulations as [the President] may prescribe' was an indication that Congress authorized revocation of student deferments for violations of the delinquency regulations. 406 F. 2d, at 638. That conclusion must be rejected for several reasons." [p. 464].

True, the opinion rejects any distinction between statutory "exemptions" and statutory "deferments." Id. p. 466. But the majority opinion, note 8 [at p. 465] and two of the concurring opinions [pp. 469-470] cite *Gutknecht v. United States* (1970) 396 U.S. 295, which holds that delinquency inductions are unauthorized by statute. *Breen* is a case involving delinquency inductions in the line of *Oestereich* and *Gutknecht* but not of *Clark*.

Petersen v. Clark (N.D.Cal. 1968) 285 F.Supp. 700, relied on originally by the district court, was reversed in *Petersen v. Clark* (9 Cir. 1969) 411 F.2d 1217.

Accordingly, the court below was correct in dismissing the action. Appellant must submit to the order of the Board and then raise his contention by habeas corpus or raise it by defense in a criminal

action, if he is prosecuted for failure to report. *Book-out v. Thomas* (9 Cir. 7/27/70) No. 23757 ..... F.2d .....

In either of such proceedings, appellant will have available the contention that the material in the selective service file was sufficient to establish a basis in fact, i.e. a prima facie case, for his dependency and hardship claim [III-A]. If this was established, the local board was required to reopen. *Petrie v. United States* (9 Cir. 1969 en banc) 407 F.2d 267, 274.

The judgment is affirmed.

Filed February 5, 1971,

Wm. B. Luck, Clerk.

Appendix IV

United States Court of Appeals
for the Ninth Circuit

No. 24,269

Dick Rheingans,
Plaintiff-Appellant,
v.
John N. Mitchell,
Defendants-Appellees.

ORDER

The petition for rehearing is denied.

James M. Carter

Filed March 5, 1971,

Wm. B. Luck, Clerk.

Appendix V

Supreme Court of the United States
No. ....., October Term, 1970

Dick Rheingans,
Petitioner

v.

John H. Mitchell, etc., et al.

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Aug. 2, 1971.

/s/ W. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 2nd day of June, 1971.

FILED
SEP 1 1971
E. ROBERT SEAVER, CLERK

No. 71-147

In the Supreme Court of the United States

OCTOBER TERM, 1971

DICK RHEINGANS, PETITIONER

v.

JOHN MITCHELL, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-147

DICK RHEINGANS, PETITIONER

v.

JOHN MITCHELL, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a Selective Service registrant, instituted the present action to compel his Local Board to set aside an order directing him to report for civilian work in lieu of induction. He alleged that the board had acted unlawfully in failing to reopen his I-O conscientious objector classification and in failing to grant him a III-A hardship classification. The District Court in 1968 reviewed petitioner's record before the draft board, found that it established a prima facie case for re-opening and enjoined the board from ordering the petitioner to appear for civilian work until the board had reopened the case and considered petitioner's request for reclassification (Pet. App. I

442-874-71

viii). On February 3, 1969, the district court, after the decision of *Clark* v. *Gabriel*, 393 U.S. 256, and relying on Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. V) 460(b)(3),[1] vacated its prior decision and dismissed the action. The Court of Appeals for the Ninth Circuit affirmed *per curiam*. As we show below, the Ninth Circuit decision is correct and there is no conflict among the Circuits. Accordingly, further review by this Court is not warranted.

The rulings by both courts below are correct. Petitioner contends that *Clark* v. *Gabriel* is inapplicable to his case and that preinduction (or pre-civilian-work) review should have been permitted under *Oestereich* v. *Selective Service Board* 393 U.S. 233, because here the conduct of the local board was "basically lawless" (393 U.S. at 237). However, unlike *Oestereich*, petitioner here was not denied either

[1] Section 10(b)(3) (50 U.S.C. (Supp. V) 460(b)(3) pertinently provides that:

"* * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title * * *, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant. * * *"

While the 1967 Act terminated on July 1, 1971 (50 U.S.C. (Supp. V) App. 467(c)), we anticipate that Congress will renew that legislation before this Court acts on the present petition for certiorari in October.

an exemption or a deferment to which he was indisputably entitled under the Act. Instead, the hardship classification sought here, like the conscientious objector classification sought in *Clark* v. *Gabriel,* was within his local board's authority to grant or deny (see 50 U.S.C. App. (Supp. V) 456(h)(1); 32 C.F.R. 1622.30(b)) and "inescapably involve[d] a determination of fact and an exercise of judgment." (393 U.S. at 258.) Moreover, the issue as to whether petitioner had a *prima facie* case for reopening is not "purely a question of law" (Pet. p. 16). What constitutes a *prima facie* showing sufficient to warrant a reopening of an outstanding classification is necessarily a mixed question of law and fact. Indeed in passing on a claim for reopening, the Board, as shown in *Mulloy* v. *United States,* 398 U.S. 410, 418, note 7, must undertake the following, essentially factual inquiries:

> (1) Is the claim "plainly incredible"?
> (2) Even if true, do the new facts alleged in the claim, warrant the reclassification sought?
> (3) Has the claim already been passed upon?
> (4) Is the claim refuted by other information in the registrant's file?

Of course, to determine these issues, the court would be required to open and examine the registrant's Selective Service file and judge the factual issues before the board as the district court initially did here. Such an examination provides "the kind of 'litigious interruptions of procedures to provide necessary military manpower' * * * which Congress sought to prevent when it enacted § 10(b)(3)." *Clark* v. *Gabriel, supra* at 258–259; see *Sloan* v. *Local Board No. 1.*

414 F. 2d 125, 128 (C.A. 10); *Ferrell* v. *Selective Service Local Board*, 434 F. 2d 686, 688 (C.A. 2).

There is no conflict in the decisions. To the contrary, all courts passing directly on the problem have ruled, as did the court below, that a Board's allegedly improper refusal to reopen when the issue to be decided requires a factual determination is insufficient to permit judicial intervention prior to induction. *Lane* v. *Local Board No. 17*, 3 S.S. L.R. 3759 (C.A. 1); *Ferrell* v. *Selective Service Board*, *supra* 434 F. 2d 686 (C.A. 3); *Edwards* v. *Selective Service Local Board No. 111*, 432 F. 2d 287 (C.A. 5), certiorari denied, 402 U.S. 952.[2]

Petitioner will have the opportunity to have the Board's refusal to reopen reviewed by the district court after he has reported for civilian work or refused to do so. *Mulloy* v. *United States* (*supra*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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[2] *Fein* v. *Selective Service System Local Board No. 7*, 430 F. 2d 376, certiorari granted, 401 U.S. 953, presents an unrelated issue involving a constitutional challenge to the taking, by a State Selective Service Director, of an appeal from a Local Board determination in favor of the registrant. There is, of course, no such issue in the present case.

U.S. GOVERNMENT PRINTING OFFICE: 1971